

**U.S. Department of the Interior
NRDAR Advisory Committee
Subcommittee Four**

**Report to the Full Committee
February 27, 2006**

I. Introduction

This report records the results of the February 2, 2006 meeting of NRDAR Subcommittee 4 at the BLM National Training Center in Phoenix, Arizona. The meeting was attended by Subcommittee 4 members Lisa Gover, Tom Jensen, Richard Seiler, Michael Smith, Sharmian White, and Charlie Wooley. Lynelle Hanson was not present. Two successive drafts of this report were presented to the Subcommittee members for review and comment.

The purpose of the Subcommittee meeting was to consider the following question assigned to the Subcommittee by the Department of the Interior:

What additional measures [i.e., additional to measures cited in questions 1-3] should DOI consider to expedite planning and implementation of restoration projects and to ensure effective and efficient restoration after awards or settlements are secured?

And, specifically:

- *Preliminary scope for dealing with the issue*
- *Additional resources needed for subcommittee work (if any)*
- *Any needed discussion by the full committee*
- *Preliminary timeline*

II. Discussion

a. Preliminary Scope for Dealing with the Issue

The Subcommittee identified numerous measures or principles that are potentially relevant to the objectives of expediting planning and implementation of restoration projects and promoting effective and efficient post-settlement or post-award restoration actions. The Subcommittee organized those measures into four broad, but interrelated categories:

1. Measures to promote the use of consensus-building resources by all parties affected by an incident that causes natural resource damage;
2. Measures to encourage coordination and cooperation between government agencies principally responsible for clean-up and trustees;

3. Measures to encourage full and constructive participation by responsible parties with clean up agencies, restoration agencies and trustees, and with their activities; and

4. Measures to encourage flexibility and creativity in the design of settlements.

Key characteristics of such reform measures are described in more detail in the following paragraphs:

1. Measures to promote the use of consensus-building resources by all parties affected by an incident that causes natural resource damage.

- Cooperative assessments appear to have both benefits and potential drawbacks. Several Subcommittee members felt that cooperative assessments present an opportunity to reduce instances of combative science, combative policy. Some Subcommittee members cautioned that cooperative assessments may work more readily in circumstances with relatively limited numbers of parties or issues, while others noted examples where it appeared that cooperative assessment had worked well in very complex settings. The Subcommittee expects to review case studies and other information available on cooperative assessments.
- The Subcommittee intends to examine ways that dispute resolution resources can be made available to parties, tailored to the types of issues in dispute. Some Subcommittee members felt that parties should be able to rely on environmental conflict resolution techniques to shape the process from the outset through conclusion. In this regard, the Subcommittee discussed:

How DOI could make sure that the MOUs used to establish trustee councils, or executed between trustees and responsible parties, provide for the sorts of dispute resolution tools that may be needed throughout the life of the “issue,” and

Means to ensure that decision-making structures and dispute resolution practices take full account of the fact that different trustees may have significantly different perspectives on a given matter. For example, tribes may attach very different values to particular sites or resources than other trustees.

- The Subcommittee intends to discuss how DOI can more fully integrate NEPA into the decision-making process to eliminate redundancy, excess paperwork, or sequential decision-making. NEPA is not a compliance stage, it is a decision-support tool that all parties, including the public, can use to try to reach consensus. Several Subcommittee members expressed an interest in identifying types of common restoration activities which might properly qualify for categorical exclusion from further NEPA analysis. In addition, the Subcommittee is interested in examining whether a type of categorical exclusion could be established to apply to those settlements supported by legitimate consensus processes that include full public engagement.

- The Subcommittee agreed to explore the concept of securing funding from responsible parties and DOI for participation in assessment and restoration planning activities, including funding for non-federal trustees.

2. Measures to encourage coordination and cooperation between government agencies principally responsible for clean-up and trustees

- The Subcommittee intends to consider ways that DOI can optimally involve trustees in deliberations regarding the clean-up of a site, so that trustees have a full understanding of the facts and issues that arise during clean-up. The Subcommittee generally agreed that trustee councils should be operative and engaged as early as possible in the remedial process, so that the trustees understand the remedy, what work remains after the remedy is implemented, and how best to fulfill their restoration work.
- The Subcommittee discussed DOI's use of MOUs and other tools to structure relationships between trustees and clean-up agencies, with the general goal of removing unnecessary institutional barriers between federal agencies. The Subcommittee will review existing national coordination MOUs between trustee agencies and response agencies to consider their terms and actual implementation. The Subcommittee members also felt that there might be merit in having DOI evaluate and report to the Committee on the question whether the IRS Code's limitation on the use of the Superfund related to NRDA is an actual barrier to DOI officials serving at EPA from being involved in NRDAR.
- The Subcommittee expects to examine other trustees' approaches to coordination with EPA and consider whether DOI should adopt similar approaches.

3. Measures to encourage full and constructive participation by responsible parties with clean up agencies, restoration agencies and trustees, and with their activities

- The Subcommittee intends to consider incentives DOI might use to promote constructive engagement by responsible parties.
- Subcommittee members cited the use of tolling arrangements as potentially valuable to improved NRDAR implementation.
- The Subcommittee expects to consider how the Executive Branch could identify an integrated goal with respect to the desired outcome of remediation and restoration in order to give all parties a complete, comprehensive view of desired outcomes, without impairing the discretion or creativity of trustee authorities.
- The Subcommittee will explore whether it would be beneficial for the agencies and trustees to identify a portfolio of categories or locations of restoration opportunities (e.g.,

listed species restoration, recreation, exotic species removal; treaty compliance, etc.), without impairing the discretion or creativity of trustee authorities.

4. Measures to encourage flexibility and creativity in the design of settlements

- The Subcommittee members expressed broad support for the principle that DOI, other trustees and parties should approach cases with a flexible approach to settlement; some instances will be amenable to use of many different approaches; others will be simpler. In this regard, the Subcommittee members expressed support for the view that DOI should embrace flexibility in the form of settlements, and in the form of settlement process, so long as the quality of outcome fully honors the public trust.
- The Subcommittee members voiced strong support for the concept that DOI should emphasize restoration metrics as the form of “currency” used to honor the public interest, rather than financial metrics, whenever possible and appropriate, and should create incentives for innovative, effective restoration proposals.
- Several Subcommittee members believe it is important that DOI accept that restoration can provide offsetting compensation when a clean-up cannot be completed, or may cause unacceptable harm; ambitious restoration can make the public whole and avoid litigation. The Subcommittee will consider whether specific strategies to further this interest would be appropriate.
- The Subcommittee members believe that DOI should anticipate that responsible parties will have different capacities to engage in discussions regarding restoration metrics, and some will not understand (and may not be interested in) anything but financial exposure.
- The Subcommittee is interested in the potential benefits that might be achieved from raising the current \$100,000 cap on administrative settlements in those cases where the settlement is supported by fair and effective stakeholder engagement processes. The Subcommittee will examine what actions would be necessary for this change to occur.

b. Additional Resources Needed

The Subcommittee agreed that our analysis would benefit greatly from access to a diverse set of case studies of “successful” and “unsuccessful” NRD settlements. Our observations are based on our familiarity with specific cases and issues, but we recognize that there are numerous other relevant cases of which we are not aware. Our sense is that we should initially ask the full Committee membership for recommendations for obtaining case studies or conducting outreach to others with relevant experience. Depending on the results of that survey, we may wish to reach outside the Committee for additional perspectives.

c. Discussion Needed by the Full Committee

See “Additional Resources” above. In addition, the Subcommittee discussed the importance of giving full consideration to the ways in which the issues or circumstances giving rise to natural resource damage may change in the coming years. Human activities affecting natural resources in the United States have changed since the years in which current laws and policies were adopted, and further changes will arise with changes in technology, trade, and other factors. The Subcommittee believes that a full Committee discussion of “what’s over the horizon” would be beneficial. This topic is related to other issues, such as changes in the science of environmental and natural resource remediation and restoration, or changes in national priorities for remediation or restoration activities.

d. Preliminary Timeframe

The Subcommittee did not identify a preliminary timeframe for our work, but we anticipate being able to do so once we have feedback from the full Committee regarding the scope of work that we have identified. Obviously, we have identified many areas we believe we should pursue. Once the Committee has expressed its views regarding the scope of work suggested, we will be in a better position to map out exactly what information we will need to gather and review, and a schedule to complete that work.